Supreme Court, U. S.
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No. 78-1372

In the Supreme Court of the United States

OCTOBER TERM, 1978

EDWARD ARAMBASICH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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vs.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Edward Arambasich, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming convictions in five different cases consolidated for appeal.

ORDER BELOW

The order of the Court of Appeals, unpublished per Seventh Circuit Rule 35, is reprinted as Appendix A.

QUESTION PRESENTED

Whether the trial court properly refused to consolidate the multiple indictments against the defendant for trial and having failed to do so violated the defendant's rights not to be placed in jeopardy a second time.

JURISDICTION

The order of the Court of Appeals was entered on November 20, 1978. Defendant's timely petition for rehearing and suggestion for rehearing in banc was denied on February 6, 1979 (Appendix B). The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. §§1254(1) and 1291 and Rule 22(2) of the Rules of this Court.

STATEMENT OF THE CASE

On May 11, 1976, the defendant, Edward Arambasich, was charged in five separate indictments with violations of Title 18 U.S.C. §1951. Each indictment was assigned to a different judge. The indictments and the judges to whom they were assigned were as follows:

United States v. Edward Arambasich— Case No. 76 CR 598 — Judge McMillen

United States v. Edward Arambasich and Howard Norberg — Case No. 76 CR 599 — Judge McGarr

United States v. Edward Arambasich and John Arambasich — Case No. 76 CR 600 — Judge Grady

United States v. Edward Arambasich and Andrew Wicevic — Case No. 76 CR 601 — Judge Decker

United States v. Edward Arambasich and Robert Seeley — Case No. 76 CR 602 — Judge Bua

The five indictments contained a total of 63 separate counts. The following is a chronological list of each charge, giving the date, case number, count of the indictment and the alleged victim.

Date	Case No.	Count No.	Victim
March, 1971 to June, 1971	602	5	Creviston Steel Co., Inc.
April, 1971 to May 16, 1972	598	35	Professional Construction Co.
April 1971 to Sept., 1971	600	2	Steel Design & Construction
May, 1971	598	40	Steel Design & Construction
May or June, 1971	598	5	Crestwood Development
June, 1971	598	26	Interstate Steel Setters
June, 1971 to Nov., 1971	599	5	Steel Structures, Inc.
August, 1971	598	27	Interstate Steel
September, 1971	598	20	Hughart Buildings, Inc.
Sept. 15, 1971	598	32	Northway Construction Co.
Oct., 1971 to Nov., 1971	602	6	Steel Structures, Inc.
Oct. 24, 1971 to Jan. 10, 1972	602	4	Badger Steel Erectors
Nov. 13, 1971	598	31	Northern Indiana Concrete

Date	Case No.	Count No.	Victim
Dec., 1971 to Feb., 1975	600	9	Steel Structures, Inc.
Dec., 1971 to June, 1972	600	6	Nu-Era Fence
January, 1972	598	6	Crestwood Development Corp.
Jan., 1972 to April 1, 1973	600	4	Integrated Building Systems
February or March, 1972	598	7	Crestwood Development Corp.
March, 1972 to October, 1972	602	2	Leonard Warden Co.
May, 1972	598	8	Crestwood Development Corp.
June, 1972	598	9	Crestwood Development Corp.
June or July, 1972	598	12	Hammond Fence Co.
July, 1972 to Nov., 1972	599	2	Hammond Fence Co.
Aug. 28, 1972	598	10	David Architectural
August, 1972	598	15	Hoffman Rosner Corp.
August, 1972 to March, 1974	600	3	David Architural Edwards Steel Construction Co.
Sept. or Oct., 1972	598	13	Hammond Fence Co., Inc.
October, 1972	598	1	Anchor Post Prod.
Feb., 1973 to Feb., 1974	600	7	Northway Construction Co.

Date	Case No.	Count No.	Victim
March, 1973	598	16	Hoffman Rosner Corp.
April, 1973 to May, 1973	599	3	Professional Constr. Co.
August, 1973	598	17	Hoffman Rosner Corp.
August, 1973	598	45	Gateway-Chilstrom Jt. Venture #22
Oct. 16, 1973	598	11	Gateway-Chilstrom Jt. Venture #22
October, 1973	598	29	Ivanhoe Metals, Inc.
Oct., 1973 to Dec. 31, 1974	60	3	Badger Steel Erectors
Dec. 1, 1973 to Feb. 8, 1974	599	4	Security Fence Co.
December, 1973	598	2	Badger Steel Erectors
Dec. 4, 1973	598	33	Northway Construction Co.
Dec. 6, 1973	598	22	Integrated Building Systems
Jan. 4, 1974	598	41	Steel Structures, Inc.
Jan. 9, 1974	598	42	Steel Structures, Inc.
March, 1974	598	14	Hammond Fence Co.
March, 1974	598	28	Inter State Steel Setters
March, 1974	598	36	Skyline Steel Erectors, Inc. (J. Roeilk)
March, 1974 to 1975	601	3	Star Erection Service
April, 1974	598	3	Badger Steel Erectors
April 25, 1974	600	5	Ivanhoe Metals, Inc.

Date	Case No.	Count No.	Victim
April, 1974 to Dec., 1975	600	8	Star Erection Service
May, 1974	598	43	Steel Structures, Inc.
July, 1974	598	14	Hudec Fence Co.
August 9, 1974	598	23	Integrated Building Systems
August 28, 1974	598	24	Integrated Building Systems
Sept. 7, 1974	598	30	M.P.G., Inc.
September, 1974	598	37	Reuben E. Smith Constr. Co.
Sept., 1974 to October, 1974	598	38	Reuben E. Smith Constr. Co.
Oct., 1974 to Feb., 1975	601	2	Reuben E. Smith Constr. Co.
Jan. 17, 1975 to Aug. 5, 1975	598	34	Northway Construction
February, 1975	598	44	Steel Structures, Inc.
March, 1975	598	4	Badger Steel Erectors
March, 1975	598	19	Hudec Fence Co.
May 29, 1975	598	39	Star Erection Service
June 20, 1975	598	25	Integrated Building Systems

The defendant entered pleas of not guilty to each indictment. Prior to trial he filed in each case a motion to consolidate for trial the five indictments against him. The motions to consolidate for trial were denied.

The Government chose to proceed first on indictment 76 CR 598. Prior to trial the court severed 14 of the

42 counts in indictment 76 CR 598. The only supposed ground for the severance was the convenience of the court, namely, to conserve the time spent in trying 76 CR 598. This was done over the defendant's objection. This trial was held in March, 1977 and the defendant was convicted and sentenced to ten years in the custody of the Attorney General. The conviction in that case was reversed on appeal and remanded to the district court for a new trial. Appendix C to this petition.

Following the trial of 76 CR 598, but prior to its reversal by the United States Court of Appeals for the Seventh Circuit, the defendant filed motions to dismiss the four remaining indictments and the remaining counts of 76 CR 598 as violative of the former jeopardy clause of the Fifth Amendment. The defendant appealed the denial of those motions in cases 76 CR 601 and 76 CR 600 and the United States Court of Appeals affirmed. See Appendices D and E. The defendant then entered into various testimonial stipulations concerning the remaining four indictments. He was found guilty of all but one of the counts in those four indictments and sentenced to four more ten year prison terms, all to run concurrently with each other and with the sentence in 76 CR 598. He appeals from the convictions in those four cases and the denial of the motion to dismiss the remaining counts in 76 CR 598. See *Abney* v. *United States,* 431 U.S. 651, 52 L.Ed.2d 651 (1977).

ARGUMENT

The record as to the Government's conduct in this case is clear. They have fostered a situation whereby the defendant was forced to defend multiple prosecutions. The difficulty in defending multiple prosecutions does not need to be restated in this brief. However, the remarks of Mr. Justice Brennan in *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 568-569, 51 L.Ed.2d 642, 649 (1977) are appropriate.

> "The development of the Double Jeopardy Clause from its common-law origins . . . suggests that it was directed at the threat of multiple prosecutions . . . Wilson held that the 'controlling constitutional principle' focuses on prohibitions against multiple trials. Id., at 346, 43 L.Ed.2d 232, 95 S.Ct. 1013. At the heart of his policy is the concern that permitting the sovereign freely to subject the citizen to a second trial for the same offense could arm government with a potent instrument of oppression. The Clause, therefore, guarantees that the State shall not be permitted to make repeated attempts to convict the accused, 'thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty" *Green* v. *United States*, 355 U.S. 184, 187-188, 2 L.Ed.2d 199; . . . see also *Downum* v. *United States*, 372 U.S. 734, 736, 10 L.Ed.2d 100. "[S]ociety's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws." *United States* v. *Jorn*, 400 U.S. 470, 479, 27 L.Ed.2d 543 (1971) (Harlan, J.)"

Rule 13 of the *Federal Rules of Criminal Procedure* defines the guidelines for consolidation in terms of when the Government may join offenses or defendants in the same indictment. It gives the court the right to protect a defendant from the basic unfairness of multiple trials by consolidating for trial the cases pending against him. Rule 13, *Federal Rules of Criminal Procedure; United States* v. *Scott*, 413 F.2d 932 (7th Cir. 1969); *King* v. *United States*, 355 F.2d 700 (1st Cir. 1966).

In most cases in which Rule 13 of the *Federal Rules of Criminal Procedure* is discussed, the motion to consolidate is made by the Government. See *King* v. *United States*, 355 F.2d 700 (1st Cir. 1966). Prior to trial the Government is obviously in a better position to argue for consolidation. As the plaintiff in a criminal case, the Government is uniquely aware of the facts on which it will rely at trial and on which the determination of whether the conduct is part of the same act or transaction or series of acts or transactions. It is for this reason this Court has imposed on the Government such a heavy burden in justifying multiple prosecutions. *Jeffers* v. *United States*, 432 U.S. 137, 53 L.Ed.2d 168 (1977). Mr. Justice Powell states unequivocally in *Jeffers* that a defendant has the right to have related charges decided in one proceeding. *Jeffers* v. *United States*, 432 U.S. 137, 154, 53 L.Ed.2d 168, 182 (1977). Mr. Justice Stevens, in his dissent, chides the majority in *Jeffers* for relying on the fact the Government was not responsible for the multiple prosecutions since it had moved to consolidate. He points out the Government's responsibility for the multiple indictments in the first place. See *Jeffers* v. *United States*, 432 U.S. 137, 158, 53 L.Ed.2d 168, 185 (1977). Here, unlike *Jeffers*, the defendant did everything he could to bring about a single trial. The Government was not only responsible for the separate indictments, but opposed every effort by the defendant to consolidate the cases for trial.

The Government's resistance to a joint trial has never included a discussion of the facts which might occasion a consolidation. The Government's reluctance to discuss them is understood when they are examined.

The Star Erection Service counts were typical. Star was the victim in Count 39 of 76 CR 598, Counts 1 and 8 of 76 CR 900 and Counts 1 and 3 of 76 CR 601. Mr. Eugene Coriell, Star employee,* testified that upon obtaining work within the defendant's local's jurisdiction, he contacted the defendant. They spoke and arranged to meet in early April, 1975 at Al's Steakhouse in Joliet, Illinois. During this meeting, the defendant told Mr. Coriell it would be necessary for Star Erection to employ a worker of the defendant's choice as a steward (the ghost payroller) and to pay him, the defendant, Edward Arambasich, front money. At a subsequent meeting, the specifics were discussed and the defendant told Coriell the amount of the cash payment and the name of the steward. The cash was paid on May 29, 1974 and the employee subsequently put on the payroll. In August, 1974, Coriell said there could be no more cash payments and another ghost payroller was added to the payroll. The cash payment was the subject of Count 39 of indictment 76 CR 598 and the defendant and one employee were charged in 76 CR 600 and defendant and the second employee were charged in 76 CR 601.

The same similarities exist for the transactions involving the contractor-victims Badger Steel Erectors, David Architectural Metals, Edwards Metals, Hammond Fence Co., Integrated Building Systems, Inc., Ivanhoe Metal, Inc., Northway Construction Inc., Professional Construction Co., Reuben E. Smith Construction Co., Steel Design and Construction Erectors, Inc. and Steel Structures, Inc. In each case, Edward Arambasich demanded a cash payment and the employment of a ghost payroller. The cash payment was made the subject of indictment 76 CR 598 and the defendant and the ghost payroller a part of a second, third, fourth and fifth indictment.

* He testified to the same facts in all three cases.

The allegations regarding Smith Construction are similar. Smith was the victim in Counts 37 and 38 of indictment 76 CR 598 and Counts 1 and 2 of 76 CR 601. The basis of these allegations was the testimony of Ronald Kinzinger, a Smith Construction employee. Kinzinger testified he met the defendant at Al's Steakhouse in the summer of 1974. It was agreed at that time Smith Construction would hire one man from Arambasich's local from whom no work would be required and pay $100 to Arambasich. The employee was Peter Jokich. He was kept on the payroll two weeks when the agreement was changed, at Kinzinger's request, to a cash payment of $1,100. Six hundred ($600.00) dollars of the money was paid when Kinzinger met with the defendant and Andrew Wicevic, one of the ghost payrollers. The remaining money was paid by payroll checks to the ghost payroller. The cash payment with the ghost payroller present was the subject of Count 37 of 76 CR 598 and checks to the ghost payroller the subject of Count 1 of 76 CR 601. What clearly is one transaction or series of transactions became two indictments. Considering these facts, it was no wonder the Government thought it unnecessary to discuss them in its pre-trial motions.

The Government cannot rely on the fact co-defendants were involved. As noted by Mr. Justice Powell and Mr. Justice Stevens, as well as the defendant, he could have been severed from his co-defendants and only his cases consolidated for trial. *Jeffers* v. *United States,* 432 U.S. 137, 143-152, 53 L.Ed.2d 168, 175-181 (1977). Although each payment may be the basis of a separate count, those payments are related and part of the same transaction or

series of transactions. *King* v. *United States,* 355 F.2d 700 (1st Cir. 1966); *United States* v. *Scott,* 413 F.2d 932 (7th Cir. 1969).

The pattern emerging from these facts is clear and uniform throughout. The defendant demands a payment from each victim to be paid by different methods. Part of the payment is to be made directly to him and other payments indirectly. Notwithstanding the different methods of payment, the payments are clearly part of the "same act or transaction or series of acts or transactions constituting" the extortion. In *United States* v. *Scott,* 413 F.2d 932, 934 (7th Cir. 1969), the Seventh Circuit set forth guidelines for the determination of joinder questions. Those criteria are "whether the transactions occurred in the same place, within a short period of time and using the same modus operandi." *United States* v. *Scott,* 413 F.2d 932, 934 (7th Cir. 1969). The transactions all occurred in the Joliet, Illinois area, they occurred continuously from March, 1971 through June, 1975 and involved cash payments *and* so-called ghost payrollers each time. It is important to note the subdivision of the charges are not based on the time of the occurrence or the victim involved. Equally important is the obviousness of those distinctions or lack of them. This Court in *United States* v. *Pointer,* 151 U.S. 396 (1894) made reference to whether the proof was separable. In these cases the same evidence was presented in two and three trials. The witnesses' testimony as well as the documents were the same.

In recent years, this Court has decided a number of cases dealing with multiple prosecutions. *Jeffers* v. *United States,* 432 U.S. 137, 53 L.Ed.2d 168 (1977); *Brown* v. *Ohio,* 432 U.S. 161, 53 L.Ed.2d 187 (1977); *United States* v. *Martin Linen Supply Co.,* 430 U.S. 564, 51 L.Ed.2d 642 (1977).

Those cases reiterate in different words the rule set down in *In Re Nielsen,* 131 U.S. 176, 9 L.Ed.2d 672 (1889).

> "where . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense."

In *Ashe* v. *Swenson,* 397 U.S. 436, 25 L.Ed.2d 469 (1970), the Court recognized the right of the Government to charge a defendant with multiple offenses based on a single criminal incident, the robbery of seven individuals at once. The defendant does not dispute the Government had the right to charge him with multiple violations of the Hobbs Act. However, the Government has no right to arbitrarily subdivide the charges and resist their consolidation so as to increase its chances of convictions. *Green* v. *United States,* 355 U.S. 184, 2 L.Ed.2d 199 (1957).

Much of the Government's justification for multiple prosecutions rests on the fact that multiple indictments were returned by the grand jury. The logic in this argument leaves much to be desired, since the very decision to return multiple indictments was the Government's. See *Jeffers* v. *United States,* 432 U.S. 137, 53 L.Ed.2d 168 (1977), dissent of Mr. Justice Stevens, footnote 2. In *Jeffers,* the Court stated with regard to a second trial "the propriety of the second trial would obviously be much different" if the Government had contributed to the separate prosecutions. In this case, the Government not only contributed to the multiple prosecutions, but is solely responsible for them. *Jeffers* presents an interesting comparison. In *Jeffers,* the defendant was charged in two indictments in violation of Title 21 U.S.C. §§ 846, 868, respectively. The *Government* filed a motion to consolidate the charges for trial. Jeffers and his nine (9) co-defendants

filed written objections to the motion. This Court relied on those objections and refused to consolidate. Notwithstanding these objections, the Court in *Jeffers* noted that those charges could have been consolidated and tried together. *Jeffers* v. *United States,* 432 U.S. 137, 53 L.Ed.2d 168, 175-181 (1977). The situation in this case is more compelling since the defendant actively sought at every stage of the proceeding to have the cases against him consolidated for trial.

The question presented in this brief is not difficult. It is simply whether the Government has the right to subject a citizen to the expense and ordeal of multiple prosecutions. Both our history and jurisprudence answer no. This answer balances the Government's vital interest in the enforcement of its criminal laws and recognizes the burdensome realities of multiple prosecutions for a citizen. The defendant in this case asks no more than these convictions be reversed and the indictments be remanded for consolidation with Case No. 76 CR 598 for trial. If these convictions are allowed to stand, it will be proof that perhaps Thrasymachos was correct when in answer to Plato's question about justice stated, "justice is the advantage of the stronger." *The Republic,* Book I.

CONCLUSION

For the above stated reasons, the petitioner respectfully requests that the Court grant a writ of certiorari to review the judgment of the Seventh Circuit.

Respectfully submitted,

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Of Counsel

APPENDIX

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

Argued: June 13, 1978

Decided: Nov. 20, 1978.

Before

Hon. William J. Bauer, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. William J. Campbell, Senior District Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee

Nos. 77-2103, 78-1270, 78-1357, 78-1530 and 78-1531 vs.

EDWARD ARAMBASICH,

Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

Nos. 76-CR-598, 76-CR-599, 76-CR-600, 76-CR-601 and 76-CR-602.

Thomas R. McMillen, Nicholas J. Bua, Bernard M. Decker, Frank J. McGarr and John F. Grady, *Judges.*

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* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

ORDER

Defendant-Appellant Edward Arambasich was charged in five separate multi-count indictments with violations of the Hobbs Act, 18 U.S.C. § 1951. Indictment 76-CR-598 charged Arambasich alone. The remaining four indictments charged Arambasich and a co-conspirator/co-defendant, each indictment naming a different co-conspirator/co-defendant. Each indictment was assigned to a different district judge. Prior to trial Arambasich filed in each case a motion to consolidate for trial all five indictments pending against him. Judge McMillen, to whom the cases had been transferred for the purpose of decision on pre-trial motions, denied the motions to consolidate.

Pointing to numerous instances in which an allegation of extortion of the same victim occurring at the same time was made the subject of different indictments, Arambasich contends that the unfairness of subjecting him to multiple trials[1] could have been avoided had the district court ordered all co-conspirators/co-defendants severed,[2] and ordered the cases against him consolidated for trial. Finding no abuse of discretion by the district court in refusing to consolidate the indictments for trial, we affirm.

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[1] Arambasich stood trial in case 76-CR-598, was found guilty by a jury of numerous counts, and was sentenced to a term of imprisonment of ten years on each count, the sentences to run concurrently. Prior to the bench trials of the other four indictments, defendant entered into various other testimonial stipulations with the government. Arambasich was found guilty on all counts, save one, of all indictments. The sentences imposed on these convictions were ordered to run concurrently with the sentence imposed in case 76-CR-598.

[2] Arambasich filed motions for severance under Rule 14, F.R. Crim.P., in each of the cases involving a co-conspirator/co-defendant, but did not allege as grounds therefor that severance would facilitate consolidation.

In relevant part Rule 13, F.R.Crim. P., provides that the district court may order two or more indictments to be tried together if the offenses and the defendant could have been joined in a single indictment. Hence, the decision on a motion to consolidate is committed to the sound discretion of the district court with reference to Rule 8, F.R. Crim.P. That Rule provides:

> (a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

The government concedes that the allegations of the five indictments were "of the same or similar character" within the meaning of (a) of Rule 8. However, since four of the indictments named a different individual as a co-conspirator/co-defendant, Arambasich had to demonstrate that he and each of his co-conspirators/co-defendants properly could have been charged in a single indictment. In this regard, Rule 8 (b) requires that all defendants be "alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an of-

fense or offenses." See *United States* v. *Scott*, 413 F.2d 932 (7th Cir. 1969); *United States* v. *Spector*, 326 F.2d 345 (7th Cir. 1963); *United States* v. *Pullings*, 321 F.2d 287 (7th Cir. 1963); *United States* v. *Whitehead*, 539 F.2d 1023 (4th Cir. 1976); *King* v. *United States*, 355 F.2d 700 (1st Cir. 1966).

The allegations of the five indictments do not meet the requirements of Rule 8 (b), and thus the indictments properly could not be consolidated for trial. Indictment 76-CR-598 charges Arambasich alone with extorting payments from contractors. The other four indictments charged different extortion conspiracies, each indictment involving a different co-conspirator. In each of these four indictments Arambasich is alleged to have extorted payments through the co-conspirator's function as a "ghost payroller." No co-conspirator is alleged to have participated in any of the other conspiracies, and no common scheme involving all defendants is alleged. While the charges clearly are of the same or similar character, we are unable to conclude that Arambasich and his co-defendants allegedly "participated in the same series of acts or transactions constituting an offense or offenses" within the meaning of Rule 8 (b), F.R.Crim.P. In view of the allegations of the indictments, the district court properly denied the motion to consolidate.

For the foregoing reasons, the judgments appealed from are affirmed.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 6, 1979

Before
Hon. William J. Bauer, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. William J. Campbell, Senior District Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee

Nos. 77-2103, 78-1270, 78-1357, 78-1530 and 78-1531 vs.

EDWARD ARAMBASICH,

Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

Nos. 76-CR-598, 76-CR-599, 76-CR-600, 76-CR-601 and 76-CR-602.

Thomas R. McMillen, Nicholas J. Bua, Bernard M. Decker, Frank J. McGarr and John F. Grady, *Judges.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges of the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

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* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

July 11, 1978.

(Argued January 10, 1978)

Before

Hon. Luther M. Swygert, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. Robert A. Grant, Senior District Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Nos. 77-1568, 77-1569 vs.

EDWARD ARAMBASICH,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Nos. 76-CR-598 & 76-CR-990

Thomas R. McMillen, Judge

ORDER

On May 11, 1976, a federal grand jury returned a 45-count indictment alleging that the appellant, Edward Arambasich, had committed 45 separate "Hobbs Act"[1] violations from May, 1975, until the date of the indictment. While the names and dates of each count were different, briefly stated, the indictment charged that the appellant was the business agent of Local 444 of the Ironworkers Union and that his victims, which were iron and steel companies within the jurisdiction of Local 444, paid extortion monies to appellant out of a fear of economic harm.[2] The government's bill of particulars disclosed that the victims' fear of economic harm stemmed from (1) the appellant's reputation for requiring payments of money to avoid harassment and as a condition of labor peace within the jurisdiction of Local 444, and (2) a specific conversation in each case during which the payment of money was demanded as the way of avoiding economic harm in the form of increased labor costs, unsatisfactory workers, labor disputes and other forms of harassment and economic injury.

* Honorable Robert A. Grant, Senior United States District Judge for the Northern District of Indiana, is sitting by designation.

On September 9, 1976, an additional five-count indictment was returned in which the appellant was charged with failure to report income from April, 1970, to April, 1974, in violation of 26 U.S.C. § 7206. The District Court ordered that the extortion and income tax cases be consolidated for trial.

The consolidated cases came to trial before a jury and the jury found appellant guilty on all counts of the tax indictment and on Counts 1, 5-10, 12-17, 21-29, and 39 of the extortion indictment. The District Court, on May 16, 1977, sentenced appellant to ten years for each extortion count and three years for each tax count, all of which were to run concurrently.

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[1] 18 U.S.C. § 1951.

[2] Counts 15-17 of the indictment plead that the victim paid money because of a fear of physical harm as well as economic harm.

The main issue in this appeal is appellant's argument that the introduction of evidence of his bad reputation, used to establish the element of fear, contradicted the generally recognized rule that evidence of bad reputation is not admissible unless a defendant puts his reputation or character into issue. *Michelson* v. *United States,* 335 U.S. 469 (1948). The government argues that fear is a necessary element of a "Hobbs Act" prosecution and that as part of their *prima facie* case it was required that they make a showing that the appellant induced the victim to part with his money or property by the use of fear. *United States* v. *Adcock,* 558 F.2d 397 (8th Cir. 1977). Thus, the government argues that evidence of the victim's knowledge of appellant's reputation is admissible for the limited purpose of showing the victim's state of mind when he paid the extorted money.

While appellant's recitation of the general rule concerning evidence of bad reputation is correct, it is recognized today that evidence of bad reputation is admissible in a "Hobbs Act" prosecution. We agree with the analysis in *United States* v. *Billingsley,* 474 F.2d 63 (6th Cir. 1973), where it was stated:

> [E]xtortion is an essential element of the Hobbs Act and to prove extortion, it is essential to show that there was a generation of fear in the victim. The reasonableness of actual or anticipated fear is a vital element in these cases, and the reputation of the defendant therefore becomes relevant since such a reputation frequently conveys a tacit threat of violence. Accordingly, the reputation of the defendant is admissible not to show that he was a bad man and likely to commit a crime, but to indicate that the threats of the defendant were not idle. We agree with the other circuits which have considered this question and hold that the evidence of the bad reputation of the defendant is admissible for the limited purpose of showing the fear and its reasonableness caused by the threats of the defendant.

474 F.2d at 65. *See also United States* v. *Tropiano,* 418 F.2d 1069 (2nd Cir. 1969); *Carbo* v. *United States,* 314 F.2d 718 (9th Cir. 1963); *Callanan* v. *United States,* 223 F.2d 171 (8th Cir. 1955). Accordingly, appellant's argument that the evidence of his bad reputation was inadmissible since he had not placed his character or reputation in issue is without merit.

Appellant also asserts, however, that the government prosecutor erroneously and repeatedly asked witnesses questions involving specific instances of his character and bad reputation. With this we must agree. A review of the record reveals numerous instances where the government went beyond asking questions concerning appellant's general bad reputation. Further, the prosecutor repeatedly asked questions concerning appellant's reputation and only subsequently would he attempt to connect this evidence of reputation to the witnesses' state of mind. It seems clear to us that the proper chronology should have been to first ask why the money was paid to appellant. Then, if the witness answered that the money was paid either entirely or partially because of appellant's reputation to do harm to those not paying, the prosecutor could properly go into the appellant's general reputation within the steel erecting and construction business in the Joliet, Illinois, area.

The question now becomes, given the existence of these errors, were they of such a magnitude as to require a new trial. While the government takes the position that some of the counts of the indictment can still stand, we are persuaded that the best course to follow is to remand this case for a new trial. We always regret the time and expense required for a new trial but, in a case such as this, with 45 counts covering various indictments and time spans, there

can simply be no assurance that the jury was able to separate out the prejudicial errors as they related to some counts while not to others. This area of reputation testimony is by its very nature highly prejudicial. Indeed, as is often said, the general rule of exclusion in regard to evidence of reputation is based not on irrelevancy but, rather, because such evidence weighs too strongly with the jury so as to over-persuade them. *Michelson* v. *United States,* 335 U.S. 469 (1948). Seen in this light, we cannot say that the prosecutorial errors concerning the type of reputation evidence sought and the manner in which the evidence was elicited did not amount to prejudicial error of a degree necessary to require a new trial.

Nor can we say the errors amounted only to that of harmless error. The well-established standard for harmless error is that it be harmless beyond a reasonable doubt. *Chapman* v. *California,* 386 U.S. 18, 24 (1967). As has already been discussed above, the errors here involved permeate the entire record and we cannot say, beyond a reasonable doubt, that the jury did not rely upon the improper reputation evidence to the prejudice of the appellant. Finally, the mere fact that limiting instructions were given is not sufficient to cure the error here involved. *United States* v. *McGhee,* 261 F.2d 609, 612 (7th Cir. 1958).

In holding, as we do, that evidence of bad reputation is admissible in a "Hobbs Act" prosecution, we feel strongly that this otherwise highly prejudicial testimony should not be permitted to permeate any counts other than the extortion counts themselves. With this admonition in mind, the District Court, on remand, will want to reconsider its order consolidating the income tax counts with this extortion case.

In summary, we hold today that the government had the right to establish whether the reputation of the appellant

played a role in creating the necessary element of fear in the minds of the various victims to these alleged "Hobbs Act" violations. However, as has been previously discussed, the type of reputation evidence sought and the manner in which it was elicited requires a remand to the District Court for a new trial.

While the appellant makes several other assignments of error, in light of our decision to remand, we do not find it necessary and, accordingly, do not rule on those contentions today.

REVERSED AND REMANDED.

SPRECHER, *Circuit Judge.* I respectfully dissent. If any error was committed it was harmless. I would affirm the judgment of conviction.

APPENDIX D

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

Argued November 21, 1977

December 2, 1977.

Before

Hon. Walter J. Cummings, Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. William J. Bauer, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 77-2069 vs.

EDWARD ARAMBASICH,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 77 CR 601

Bernard M. Decker, Judge.

ORDER

On May 11, 1976, appellant Edward Arambasich and Andrew Wicevic (who is not involved in this appeal) were named in a three-count indictment, 76 CR 601, under the Hobbs Act (18 U.S.C. § 1951). According to that indictment appellant was a business agent of Iron Workers Local 444[1] and his co-defendant was a member of that Local. Count One charged that from March 1974 until March 1975 defendants conspired to extort an unspecified amount of property [approximately $600 and $3,178.32 respectively, as revealed by Counts Two and Three] for Wicevic from the Ruben E. Smith Construction Company and Star Erection Service for fictitious services.

Count Two charged the defendants with a substantive violation of the Hobbs Act from October 1974 until February 1975 by extorting some $600 from the Smith Company for Andrew Wicevic for fictitious services.

Count Three alleged that from March 1974 until March 1975 the defendants extorted some $3,178.32 from Star for Wicevic for fictitious services, again in violation of the Hobbs Act.

No trial of the offenses charged in this indictment has yet occurred. However, appellant was convicted under 22 counts of the Hobbs Act indictment in 76 CR 598 on March 21, 1976, and received ten-year concurrent sentences for those offenses. This conviction is presently on appeal in No. 77-1568.[2] Appellant claims that indictment 601 must be dismissed on the ground that his prosecution thereunder would violate the Double Jeopardy clause of the Fifth Amendment. In this connection, appellant relies on the parallelism of Counts 37, 38 and 39 of indictment 598 and the three counts of indictment 601.

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[1] Local 444 is an affiliate of the International Association of Bridge, Structural and Ornamental Ironworkers.

[2] At oral argument, we were advised that in the event of affirmance, the Government may drop the other charges pending against appellant.

Count 39 of which appellant was convicted charged that he violated the Hobbs Act on May 29, 1974[3] by obtaining $1,000 from Star which was "neither due him nor intended to be used for legitimate union purposes or goals * * *."

Count 37, which was severed and not yet tried, alleges that appellant violated the Hobbs Act in September 1974 by obtaining about $600, which also was not due him nor intended to be used for legitimate union purposes or goals, from the Smith Company.

Count 38, which was also severed and untried, charges that appellant violated the Hobbs Act from September 1974 until October 1974 by causing about $361 to be obtained by Peter Jokich from the Smith Company for fictitious services.

After considering the briefs with respect to appellant's motion to dismiss the indictment, Judge Decker concluded as follows:

> "Arambasich has moved to dismiss the indictment on the grounds that he has already been convicted of the offenses charged in a trial before Judge McMillen of this court, Indictment No. 76 CR 598. As to Star Erection, it appears that 76 CR 598 dealt with a specific payment of $1,000 in cash on May 29, 1974, and that the instant indictment deals with a separate transaction in which Star Erection agreed to pay Wicevic as a 'ghost payroller' on different construction jobs. The court finds that the two indictments charge separate violations of the Hobbs Act. As to Smith Construction, the counts dealing with that company in 76 CR 598 were severed and appear never to have been tried, [so] that jeopardy did not attach. If the government attempts to proceed with both indictments, defendant may renew its motion. As to the conspiracy charges,

[3] Because of a typographical error, the date appearing in the indictment was May 29, 1975, but the parties concede that May 29, 1974, is the correct date.

> it is clear that conspiracy and extortion are separate offenses under the Hobbs Act. *Callanan* v. *United States,* 364 U.S. 587 (1961); see also *United States* v. *Palermo,* 410 F.2d 468, 470-71 (7th Cir. 1969). The motion to dismiss the indictment is hereby denied."

We affirm.

Severance and Consolidation

In his July 29, 1977, motion to dismiss the indictment, appellant claims he should not be brought to trial under indictment 76 CR 601 "since to do so would violate his [Fifth Amendment] right not to be placed in jeopardy twice for the same offense." Since this appeal is only from Judge Decker's order denying that motion, we consider only briefly Judge McMillen's severance of 13 extortion counts in 76 CR 598[4] and his denial of Arambasich's motion to consolidate the trial of that indictment with four other Hobbs Act indictments pending against appellant and others.[5] The government opposed the consolidation because *Kotteakos* v. *United States,* 328 U.S. 750, would assertedly prevent the four alleged conspiracies from being tried as a single conspiracy, and on appeal disputes appellant's contention that consolidation and severance are relevant to the Double Jeopardy issue. Appellant does not explain specifically why he thinks the severance motion is relevant to this appeal, but does argue that the Government's opposition to the consolidation issue is made relevant to the Double Jeopardy issue by *Jeffers* v. *United States,* ..... U.S. ....., 45 LW 4691.

[4] The severance was ordered by the trial judge over appellant's objection to save court time.

[5] 76 CR 599 named appellant and Howard Nordberg as defendants; 76 CR 600 named appellant and his brother John as defendants; 76 CR 601, as noted, named appellant and Andrew Wicevic as defendants; and 76 CR 602 named appellant and Robert Seeley as defendants.

The argument that *Jeffers* requires consideration of the court-ordered severance and the denial of the consolidation motion draws in large part from a footnote in Justice Blackmun's plurality opinion which states that "[t]he considerations relating to the propriety of a second trial obviously would be much different if any action by the Government contributed to the separate prosecutions on the lesser and greater charges." 45 LW at 4695 n. 20. Assuming that this dictum also applies to separate prosecutions for similar offenses and to cases in which waiver of a defendant's Double Jeopardy rights is not an issue, in the absence of more precise guidance from the Supreme Court as to how the considerations would differ, we think this language should not be given as broad a reading as appellant suggests but rather should be interpreted in light of the remainder of the *Jeffers* footnote and in light of the previous experience of the Courts of Appeals in reviewing similar matters. Both the remainder of the footnote, which inquires into the reasonableness of and the motive for the Government's request for two separate indictments, and the previous case law, which under certain circumstances in conspiracy cases suggests an inquiry into whether the Government's subdivision of charges is arbitrary (see *e.g., United States* v. *Papa,* 533 F.2d 815, 820 (2d Cir. 1976)), indicate that the type of review suggested by the foregoing *Jeffers* language should be only to determine whether the Government's action in dividing the charges and insisting that they be tried separately is unreasonable, arbitrary, or in bad faith. On the facts of this case and in light of *Kotteakos,* we decline to make such a finding.

Of the 45 counts in indictment 598, 13 were severed; a jury found appellant guilty of 22 and innocent of two. On the Government's motion, five counts were dismissed and

the district court acquitted appellant of three counts.[6] Only severed Counts 37 and 38 and tried Count 39 are used by appellant as the basis for his Double Jeopardy claim.

Pertinent Double Jeopardy Principles

Under the controlling authorities, it is clear that trials of appellant in 76 CR 598 and 76 CR 601 would violate his Fifth Amendment Double Jeopardy right only if the evidence required to support a conviction in one would support a conviction in the other. *United States* v. *Papa,* 533 F.2d 815, 820 (2d Cir. 1976), and cases cited.[6] As we stated in *United States* v. *Bruni,* 359 F.2d 807, 809 (1966), certiorari denied, 385 U.S. 821:

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[6] On the Government's motion, the five-count tax indictment in 76 CR 990 alleging that appellant understated his income by not including his Hobbs Act income for 1970 through 1974 in violation of 26 U.S.C. § 7206(1) was consolidated for trial with the unsevered counts in indictment 76 CR 598. A jury found defendant guilty as charged in all five tax counts and he received concurrent sentences of three years on each of the five counts to run concurrently with the ten-year concurrent Hobbs Act sentences imposed in 76 CR 598. His conviction in 76 CR 990 has been appealed as No. 77-1569. That appeal and the one in 76 CR 598 have been consolidated for purposes of briefing and oral argument, but those appeals have not yet been heard.

[6] Contrary to the appellant's assertion, *Papa* does not establish that the burden of proof as to the similarity of the offenses always shifts to the Government when the appellant shows some evidence of unity. *Papa* began with the proposition that because of its "myriad channels," a narcotics conspiracy deserved special treatment in order to avoid abuses by prosecutors. Here, unlike *Papa,* only one conspiracy was charged and appellant makes no claim that extortion schemes are as susceptible to overlapping charges as narcotics conspiracies.

> "Offenses are not the same for purposes of the double jeopardy clause simply because they arise out of the same general course of criminal conduct; they are the 'same' only when 'the evidence required to support a conviction upon one of them (the indictments) would have been sufficient to warrant a conviction upon the other' " (quoting from *United States* v. *Kramer,* 289 F.2d 909, 913 (2d Cir. 1961)).

It is also settled that each of multiple payments by a victim to an extorter constitutes a separate offense[7] (*United States* v. *Addonizio,* 451 F.2d 49, 59 (3d Cir. 1972), certiorari denied, 405 U.S. 936; see *United States* v. *Tolub,* 309 F.2d 286 (2d Cir. 1972); *United States* v. *Palermo,* 410 F.2d 468, 471 (7th Cir. 1969)), as does a conspiracy to extort. *Callanan* v. *United States,* 364 U.S. 587; *United States* v. *Jacobs,* 451 F.2d 530 (5th Cir. 1971), certiorari denied, 405 U.S. 955. With these principles in mind, it must now be determined whether the proposed trial of 76 CR 601 would constitute placing appellant in jeopardy a second time for the same offenses against Star and the Smith Company.

Star Erection Service

As seen, under Count 39 of indictment 598, defendant alone was convicted of extorting $1,000 from Star on May 29, 1974. At the trial, Star superintendent Gene Coriell testified that he gave $1,000 in cash to defendant outside

[7] Appellant's contention that *Ashe* v. *Swenson,* 397 U.S. 436, 446, holds that such distinct offenses cannot be prosecuted in separate indictments is unpersuasive. The language in *Ashe* to which appellant refers deals with collateral estoppel (see *id.* at 448-449 (Brennan, J., concurring)) and means only that once a factual issue is resolved against the Government, it cannot relitigate that issue before another jury even if the new jury is faced with a technically different offense.

a Howard Johnson restaurant in Joliet, Illinois, on May 29, after defendant had demanded "some front money" in early April so that Star could execute a steel erection job in Shorewood, Illinois, with its own employees.

In contrast to that case, Count One of indictment 601 charged that appellant and his co-defendant Andrew Wicevic conspired that property [$3,178.32 per Count Three] be obtained by extortion from Star for Wicevic's fictitious services. Not only is a conspiracy a separate crime from the substantive offense alleged in Count 39 of indictment 598, but Wicevic was not even involved in that indictment, nor was he mentioned in Coriell's trial testimony. Likewise, Count Three of the present indictment involves appellant and Wicevic who allegedly extorted $3,178.32 from Star for Wicevic's fictitious services. This count too is equally divorced from the transaction covered by Count 39 of the 598 indictment. The Grand Jury testimony of Coriell, attached to the appellant's motion to dismiss, shows that the extortion covered by indictment 601 occurred three months after the $1,000 payment to appellant involved in 598 and did not even concern the Shorewood project. Consequently, as to Star, 76 CR 601 can be tried without violating the Double Jeopardy clause.

Ruben E. Smith Construction Company

Count 37 of indictment 598 charges that defendant extorted $600 from the Smith Company in September 1974, and Count 38 charges that he extorted $361 from that company for Peter Jokich for fictitious services during September and October 1974. These counts have not yet been tried and in any event differ from Counts One and Three of indictment 601. Count One alleged that appellant and Wicevic conspired to extort payments [$600 per Count Two] from the Smith Company for Wicevic's ficti-

tious services and Count Two alleged that from October 1974 until February 1975 they extorted $600 from the Smith Company for his fictitious services. On the face of the two indictments, the two $600 transactions are not the same. In 598, only defendant received $600 and the payment was in September 1974. In 601, the $600 involved Wicevic and was paid later. If at the trial of 601 the payment of $600 turns out to be the same $600 as in Count 37 of 598, then appellant can assert double jeopardy to avoid a trial of that count. Thus far appellant has not established that the Government is engaged in multiple prosecutions of him for the same offense, plainly forbidden by the Double Jeopardy clause. *United States* v. *Martin Linen Supply Co.*, ... U.S. ....., ..., 45 LW 4337, 4339; *Jeffers* v. *United States*, ... U.S. ....., ..., 45 LW 4691, 4695.

Since Counts 37 and 38 have not yet been tried in case 76 CR 598, appellant has been forced to rely on Ronald Kinzinger's grand jury testimony considered by the trial judge in aggravation in 76 CR 598 before sentencing appellant on the 22 counts of which he was found guilty. Kinzinger was the Smith Company officer who negotiated the extortion payments. But Judge McMillen's consideration of Kinzinger's grand jury testimony before sentencing appellant was not a judgment or punishment as to Counts 37 and 38,[8] so that the Double Jeopardy clause was not violated.

Order affirmed.

[8] See *United States* v. *Haygood*, 502 F.2d 166, 169 (7th Cir. 1974), certiorari denied, 419 U.S. 1114.

APPENDIX E

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Submitted December 29, 1977

December 29, 1977

Before

Hon. Thomas E. Fairchild, Chief Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 77-2235 vs.

EDWARD ARAMBASICH,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 76-CR-600

John F. Grady, Judge.

This matter comes before the court on the "MOTION FOR AFFIRMANCE WITHOUT BRIEFS OR ORAL ARGUMENT" filed herein on December 16, 1977, and the "DEFENDANT'S RESPONSE TO GOVERNMENT'S MOTION FOR AN AFFIRMATION WITHOUT BRIEFS OR ORAL ARGUMENT" filed herein on December 28,

1977, and the record certified to this court on December 21, 1977.

This court ordered defendant on December 20, 1977, to respond to the merits of the government's claim before December 28, 1977. This schedule allowed the defendant five (5) working days to respond, excluding December 26th as a holiday. The response filed by defendant's counsel can best be described as vague, inconclusive, and indeed non-responsive to this court's order. For example, he states: "The appeal in this matter is not frivolous nor taken for delay." However, he gives no explanation for this statement. Further, he adds that while the issues pending in this appeal are similar to those in Case No. 77-2069, which was decided by this court on December 2, 1977, the facts are different. Yet, in his response, he does not indicate what these distinguishable facts are.

This court has independently reviewed the indictments in 76-Cr-600 and 76-Cr-598. As was noted in our opinion of December 2, Indictment 598 is concerned with the defendant alone who was convicted of personally extorting money in violation of the Hobbs Act. Indictment 600 alleges that defendant and a co-defendant, John Arambasich, conspired to, and did, extort money in violation of the Hobbs Act. It is clear that conspiracy and extortion are separate offenses under the Hobbs Act. *Callanan* v. *United States,* 364 U.S. 587 (1961); see also *United States* v. *Palermo,* 410 F.2d 468, 470-71 (7th Cir. 1969).

Accordingly, after a review of the indictments, the record transmitted hereto, and the aforementioned motions,

IT IS ORDERED that the order of District Court Judge John F. Grady of December 13, 1977, denying defendant's motion to dismiss the indictment as violative of the former jeopardy clause of the Fifth Amendment, is AFFIRMED.

IT IS FURTHER ORDERED that the mandate in this appeal shall issue forthwith.

Supreme Court, U. S.
FILED
MAY 12 1979
MICHAEL RODAK, JR., CLERK

No. 78-1372

In the Supreme Court of the United States

OCTOBER TERM, 1978

EDWARD ARAMBASICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1372

EDWARD ARAMBASICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 1978. A petition for rehearing was denied on February 6, 1979 (Pet. App. B). A petition for a writ of certiorari was filed on March 8, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's motions to consolidate several indictments for trial should have been granted.

STATEMENT

1. On May 11, 1976, five indictments were filed in the United States District Court for the Northern District of Illinois charging petitioner with violations of the Hobbs Act, 18 U.S.C. 1951. One indictment (76-CR-598) charged petitioner with 45 counts of extortion in his capacity as business agent of Local 444 of the Ironworkers Union. The other four indictments (76-CR-599 through 76-CR-602) likewise charged petitioner with extortion and also alleged that he had conspired to commit extortion. The first indictment named petitioner alone and involved direct payments by steel erection contractors to petitioner in response to his extortionate demands. The other four indictments charged petitioner together with a co-conspirator; a different co-conspirator was named in each indictment. These four indictments alleged that petitioner had demanded that contractors make payments to his co-conspirators, who were then placed on company payrolls but did no work (Pet. App. 2, 6-7).

Each substantive count in the five indictments related to a separate payment, either directly to petitioner or to a "ghost payroller." In some cases the same company both paid petitioner directly and paid a ghost payroller. In other cases, the company made payments only to petitioner or only to the ghost payroller.

Prior to trial, petitioner moved to consolidate all five indictments for trial, but these motions were denied. He also moved to sever his co-defendants in indictments 76-CR-599 through 76-CR-602; these motions were also denied (Pet. App. 2 & n.2).

On September 9, 1976, an additional five-count indictment was returned charging petitioner with failing

to report income in violation of 26 U.S.C. 7206 (76-CR-990). The understated income was derived from the extortionate transactions charged in 76-CR-598 (Pet. App. 7). The tax evasion counts were consolidated for trial with some of the substantive extortion counts charged in 76-CR-598, while others of those counts were severed. After a jury trial of these tax and extortions counts, petitioner was convicted on 23 counts of extortion and five counts of tax evasion, and acquitted on two counts of extortion.[1] He was sentenced to 10 years' imprisonment on each extortion count and three years' imprisonment on each tax count, all of which were to run concurrently (*ibid.*).

Petitioner then proceeded to trial over a period of four months on the remaining counts of 76-CR-598, and the counts contained in 76-CR-599 through 76-CR-602. After trials on stipulated evidence, petitioner was convicted on all but one of the counts in these indictments. The sentences on these convictions were ordered to run concurrently with the sentences imposed in the first trial (Pet. App. 2 n.1).

On appeal of the judgments in the first trial, the court of appeals reversed and remanded for a new trial, holding that the type of reputation evidence adduced by the government and the manner in which it was elicited was prejudicial error (Pet. App. 6-11). On petitioner's appeal of the judgments in the remaining trials, the court of appeals affirmed (Pet. App. 1-4). It is the latter decision that is the subject of this petition.

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[1]The remaining counts of 76-CR-598 that were tried with 76-CR-990 were disposed of during trial on motions for acquittal or pursuant to the government's motion to dismiss.

ARGUMENT

Petitioner contends (Pet. 8-14) that the trials in all five Hobbs Act indictments (76-CR-598 through 76-CR-602) should have been consolidated to save him from "the expense and ordeal of multiple prosecutions" (Pet. 14). The remedy he asks (*ibid.*) is that the judgments be reversed and the cases remanded for retrial with the counts of 76-CR-598 that have already been reversed and remanded by the court of appeals (see Pet. App. 6-11).

While it is true that the Hobbs Act offenses with which petitioner was charged could have been joined for trial, since they were "of the same or similar character" (Fed. R. Crim. P. 8(a)), it does not follow that the conspiracy indictments, which charged not only petitioner but also various co-defendants, could properly have been joined. These co-defendants did not "participate[ ] in the same act or transaction or in the same series of acts or transactions * * *" (Fed. R. Crim. P. 8(b)). Rather, as the court of appeals held (Pet. App. 4):

> Indictment 76-CR-598 charges Arambasich alone with extorting payments from contractors. The other four indictments charged different extortion conspiracies, each indictment involving a different co-conspirator. In each of these four indictments Arambasich is alleged to have extorted payments through the co-conspirator's function as a "ghost payroller." No co-conspirator is alleged to have participated in any of the other conspiracies, and no common scheme involving all defendants is alleged.

And even if, contrary to the court of appeals' conclusion, the co-conspirators' conduct would have

permitted joinder in a single indictment under Rule 8(b), a joint trial was subject to the objection by the co-conspirators that they would be prejudiced by the mass of evidence relating to extortionate transactions in which they took no part. See *Kotteakos* v. *United States*, 328 U.S. 750, 773-774 (1946).

Petitioner argues (Pet. 11), however, that his cases should have been severed from those of his co-defendants, so that all the charges against petitioner could then have been consolidated. The short answer (see Pet. App. 2 n.2) is that petitioner did not request severances on the ground that such action would facilitate consolidation of the charges against him.[2] He cannot complain now if the trial court did not consider this additional ground for severance. See, *e.g.*, *Ginsberg* v. *United States*, 96 F. 2d 433, 436 (5th Cir. 1938).[3]

In any event, it is a settled principle that defendants jointly indicted should be tried together, particularly where conspiracy is alleged, unless they can make a compelling showing of prejudice. This presumption in favor of joint trials serves the interests of judicial

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[2]In his severance motions he alleged only that if his co-defendants testified, the jury might draw adverse inferences about his failure to testify; that he would be prevented from calling his co-defendants as witnesses unless a severance was granted; and that testimony admissible only against his co-defendants would prejudice him if he was tried with his co-defendants.

[3]Because the five indictments were returned at the same time, the Department of Justice policy that several federal offenses arising out of a single transaction generally should be tried together in a single federal prosecution (see *Petite* v. *United States*, 361 U.S. 529 (1960)) does not apply to any of the counts of these indictments, even assuming they could be properly viewed as arising out of the same transactions.

economy and reduces the burden on witnesses and the expenses of trial. See *United States* v. *Perez*, 489 F. 2d 51, 65 (5th Cir. 1973), cert. denied, 417 U.S. 945 (1974); *United States* v. *Cervantes*, 466 F. 2d 736, 739 (7th Cir.), cert. denied, 409 U.S. 886 (1972); *United States* v. *Hines*, 455 F. 2d 1317, 1334 (D.C. Cir. 1971), cert. denied, 406 U.S. 975 (1972).

Here, the government's grouping of counts in five separate indictments was logical and prevented wasteful duplication of proof. It recognized that the co-defendants were likely to complain of prejudice if they were joined with petitioner's other co-defendants, or with the 45-count indictment charging payments made directly to petitioner. Further, it minimized overlapping proof. Contrary to petitioner's allegations (Pet. 10-12), the government did not prove its case once in 76-CR-598 and then again in succeeding trials.

Even in cases in which a company made payments both directly to petitioner (charged in 76-CR-598) and to a ghost payroller (charged in 76-CR-599 through 76-CR-602) in response to the same demand by petitioner, the proof in the various trials was not the same. Although it was necessary in some cases to prove the extortionate demand in two trials, the proof of payment was different in each indictment and was made only once. If, however, petitioner were severed from his co-defendants, as he now urges, proof of payment would also have to have been made twice.

In addition, in a number of instances, the only payment that a contractor made in response to a particular demand by petitioner was payment to a ghost payroller. All elements of these transactions were

proved only once, in the trials in 76-CR-599 through 76-CR-602.[4] Severing petitioner from his co-defendants would have required duplicating the entire proof of these substantive and conspiracy allegations, first in petitioner's consolidated trial and then again in the co-conspirators' trials. Further, any evidence rebutting defense witnesses would, in all likelihood, have had to be presented twice. In these circumstances, judicial economy was served by grouping the substantive charges against petitioner relating to ghost payroller payments together with the corresponding conspiracy counts, and then charging petitioner together with his co-conspirator in the same indictment.

Petitioner's current claim of prejudice must be weighed against the wasteful duplications of proof that would have resulted from severance. But petitioner made no showing of prejudice in the trial court, and even now makes no particularized claim of prejudice, simply referring generally to "the expense and ordeal of multiple prosecutions" (Pet. 14). This assertion, however, does not withstand examination. Each of the counts against him involved a different violation of the Hobbs Act (see *United States* v. *Addonizio*, 451 F. 2d 49, 59-60 (3d Cir. 1971), cert. denied, 405 U.S. 936 (1972); *United States* v. *Tolub*, 309 F. 2d 286, 289 (2d Cir. 1962)), so he would ultimately have to prepare a defense to each of these charges, whether they were tried together or in a series. And since the last four trials were conducted on the basis of stipulated evidence, any inconvenience to petitioner from separate

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[4]See, *e.g.*, 76-CR-599, Counts 1 and 4 (Security Fence Co.); 76-CR-600, Counts 1, 4 and 6 (Integrated Building Systems and Nu-Era Fence Erectors, Inc.); 76-CR-601, Counts 1 and 2 (Ruben E. Smith Construction Co.); 76-CR-602, Counts 1 and 2 (Leonard Warden Co.).

trials could not have been significant. Indeed, petitioner's requested relief in this Court—retrial of all the counts that are the subject of this petition, together with the counts already returned to the district court for retrial in 76-CR-598—belies his complaint that he had already been subjected to an unacceptable "ordeal" of multiple prosecutions.[5]

In these circumstances, the district court did not abuse its discretion in denying the motion to consolidate.[6]

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[5]Indeed, even if the district court had improperly denied petitioner's severance motion, it is unclear what relief would be available. Often, an improper denial of severance can be remedied by remand for a new trial without the co-defendant. See, *e.g.*, *United States* v. *Vigil*, 561 F. 2d 1316 (9th Cir. 1977) (co-defendant would testify for defendant if trials severed). But where the prejudice suffered is not to the ability to defend against the charges but instead entails the inconvenience of multiple trials, a remand for yet another, consolidated trial does not provide a cure.

[6]Petitioner relies on *Jeffers* v. *United States*, 432 U.S. 137 (1977), in contending that the multiple prosecutions in his case violated the Double Jeopardy Clause. But *Jeffers* involved two closely related offenses arising out of the same transactions, one of which was assumed by the Court to be a lesser included offense of the other; offenses in those circumstances are "the same" for double jeopardy purposes since they fail to meet the test that each must include an element not contained in the other (*id.* at 151-152). Here, by contrast, while petitioner was charged in numerous counts with the same type of offense (*i.e.*, conspiracy or extortion), each count involved a separate payment in response to extortionate demands; involving as they did separate transactions, petitioner's numerous conspiracy and extortion offenses simply were not the same for purposes of double jeopardy analysis.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

EDWARD ARAMBASICH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES

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ARGUMENT

The Government's brief illustrates a callous indifferent attitude to the prejudice created by multiple prosecutors (G.Br. 7). *The brief infers a defendant is not prejudiced by having to defend five separate cases rather than one consolidated case.* This attitude of the Government is contrary to a long line of cases decided by this Court and cited by Petitioner in his brief. *Brown* v. *Ohio,* 432 U.S. 161, 53 L.Ed.2d 187 (1977); *Jeffers* v. *United States,* 432 U.S. 137,

53 L.Ed.2d 168 (1977); *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 51 L.Ed.2d 642 (1977); *Ashe* v. *Swenson*, 397 U.S. 436, 25 L.Ed.2d 469 (1970); *Green* v. *United States*, 355 U.S. 184, 2 L.Ed.2d 199 (1957); *In Re Nielsen*, 131 U.S. 176, 9 L.Ed.2d 672 (1889). This court's concern about multiple prosecutions was best stated in *Green* v. *United States*, 355 U.S. 184, 2 L.Ed.2d 199 (1957). The Court stated multiple prosecutions subject a defendant to embarrassment, expense and ordeal

> *"as well as enhancing the possibility that even though he may be innocent he may be found guilty"* (emphasis added) *Green* v. *United States*, 355 U.S. 184, ... (1957)

Justice Harlan again stated the Court's concern in *United States* v. *Jorn*, 400 U.S. 470, 479, 27 L.Ed.2d 543 (1971):

> "[S]ociety's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws." *United States* v. *Jorn*, 400 U.S. 470, 479, 27 L.Ed.2d 543 (1971)

Mr. Justice Brennan made the same observation in *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 569, 516 L.Ed.2d 642, 644 (1977).

This Court has always recognized that multiple charges increase the Government's chances for conviction as well as recognizing the impossibility of defending one indictment after another. *Ashe* v. *Swenson*, 397 U.S. 436, 25 L.Ed.2d 469 (1970). This defendant asked the District Court for no more than this Court granted the defendant in *Ashe* v. *Swenson*, namely, a single trial to determine his guilt or innocence. The consolidation of his cases would not have required duplication of proof or inconvenience of witnesses. There

would have been the same number of trials and the witnesses would have appeared the same number of times and given the same testimony. The difference, and only difference, would be the defendant would be tried on all the charges at once. Thus, the Government would not have had five (5) opportunities to convict him.

The Government brief attempts to minimize the effect of the prejudice by pointing to the fact "the last four trials were conducted on the basis of stipulated evidence"[1] and, thus, what may have been prejudice becomes inconvenience. (Government's brief p. 7) This is ridiculous. The "inconvenience" of which the Government speaks is the onerous burden of defending five indictments and convincing five juries of his innocence. The stipulations merely reflect the defendant's recognition of the impossibility of accomplishing that goal regardless of his innocence and the expense of trying. The stipulations were an effort to preserve his rights regarding consolidation, yet, reflect the futility and expense of having to defend them. The stipulations were not bargains made by equals, but rather practical accommodation with reality. The defendant's strategy was dictated by the fact he had to defend and win five cases. The only case where there was a trial, he stands *not guilty*. The reality and cruelness of prejudice is only now fully evident. The conviction in 76 CR 598 has been remanded for a new trial and the Government has stated that that case will be dismissed when these convictions are affirmed. Thus, his conviction and imprisonment will be the direct result of the impossible burden of defending five separate indictments. Nothing could be more unfair. *Rinaldi* v. *United*

[1] The fact is that the defendant stipulated to the Government's version of the witnesses' testimony, a strategy dictated by the same concerns this court disapproved of in *Ashe* v. *Swenson* and other cases.

States, 434 U.S. 22, 54 L.Ed.2d 207 (1977); *Ashe* v. *Swenson,* 392 U.S. 436, 25 L.Ed.2d 469 (1970).

Multiple prosecutions can hardly be characterized as an "inconvenience". As noted, this Court has continually found them to be offensive to the constitution. *Ashe* v. *Swenson,* 397 U.S. 436, 90 S.Ct. 1189 (1970). In fact, the position of the Government in this case is inconsistent with its position in numerous other cases. See *Petite* v. *United States,* 361 U.S. 529 (1960). *Frakes* v. *United States,* 435 U.S. 911 (1978) (mem.) (vacating *United States* v. *Frakes,* 563 F.2d 803 (6th Cir. 1977) (per curiam); *Rinaldi* v. *United States,* 98 S.Ct. 81, 86 (1977) (per curiam) (vacating *In re Washington,* 544 F.2d 203 (5th Cir. 1976) (en banc); *Croucher* v. *United States,* 429 U.S. 1034, 1034 (1977) (mem.) (vacating *United States* v. *Houltin,* 525 F.2d 943 (5th Cir. 1976); *Watts* v. *United States,* 422 U.S. 1032, 1032 (1975) (mem.) (vacating *United States* v. *Watts,* 505 F.2d 951 (5th Cir. 1974) (per curiam); *Ackerson* v. *United States,* 419 U.S. 1099, 1099 (1975) (mem.) (vacating *United States* v. *Ackerson,* 502 F.2d 300 (8th Cir. 1974); *Hayles* v. *United States,* 419 U.S. 892, 892 (1974) (mem.) (vacating *United States* v. *Hayles,* 492 F.2d 125 (5th Cir. 1974); *Marakar* v. *United States,* 370 U.S. 723 (1962).

The Government's reference in its brief to the *Petite* policy being inapplicable is inconsistent with logic and this Court's interpretation of that policy. *Rinaldi* v. *United States,* 434 U.S. 22, 24, 54 L.Ed.2d 207, 211 (1977). In a footnote (#5) to that opinion the Court stated:

> "But as the *Petite* case itself illustrates, the policy also encompasses successive federal prosecutions arising out of the same transaction. In that case, the Solicitor General represented that "it is the general policy of the Federal Government 'that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement.' The Solicitor General on behalf of the Government represents this policy as closely related to that against duplicating federal-state prosecutions, which was formally defined by the Attorney General of the United States in a memorandum to the United States Attorneys. (Department of Justice Press Release, April 6, 1959)."

See also, Department of Justice, United States Attorney's Manual §§9-2.142[1] and §§9-2.143.[2] The fact the indictments were returned at the same time makes no difference. The effect on the defendant is the same.

Wherefore, for the above stated reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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[1] §§9-2.142 of the Manual reads: "No Federal case should be tired when there has been a state prosecution for substantially the same act or acts without a recommendation having been made to the Assistant Attorney General demonstrating compelling Federal interests for such prosecution.

"No such recommendation may be approved by the Assistant Attorney General without having it first brought to the attention of the Attorney General."

[2] §§9-2.143 of the Manual reads: "When several offenses arise out of a single transaction, they should be alleged and tried together and should not be made the basis of multiple prosecutions. If a prospective defendant has been Federally prosecuted for an offense and a United States Attorney desires to further prosecute him for another offense arising from the same transaction, a recommendation for this course of action shall be submitted to the Assistant Attorney General for approval prior to initiating prosecution."

APPENDIX

APPENDIX TO REPLY

Badger Steel Erectors are alleged victims in Counts 2, 3 and 4 of indictment 76 CR 598 and Counts 1 and 2 of indictment 76 CR 602. In both indictments Robert Seeley is alleged to have received the extortionate payment. The extortion in indictment 76 CR 598 is alleged to have occurred in December, 1973 (Count 2), April, 1974 (Count 3), and March, 1975 (Count 4). The extortion in indictment 76 CR 602 is alleged to have occurred from March, 1971 to December 31, 1974 (Count 3).

David Architectural Metals, Inc. is the alleged victim in Count 10 of indictment 76 CR 598 and Counts 1 and 2 of indictment 76 CR 600. The extortion in indictment 76 CR 598 is alleged to have occurred on August 28, 1972. The extortion in indictment 76 CR 600 is alleged to have occurred from August, 1972 to March, 1974.

Hammond Fence Company is the alleged victim in Counts 12, 13 and 14 of indictment 76 CR 598 and Counts 1 and 2 of indictment 76 CR 599. The extortion in indictment 76 CR 598 is alleged to have occurred June or July, 1972, September or October, 1972, and March, 1974, respectively. The extortion in indictment 76 CR 599 is alleged to have occurred in June, 1971, and July, 1972 to November, 1972.

Integrated Building Systems, Inc. is the alleged victim in Counts 22, 23, 24 and 25 of indictment 76 CR 598 and Counts 1 and 4 of indictment 76 CR 600. The extortion in indictment 76 CR 598 is alleged to have occurred on December 6, 1973, August 9, 1974 and August 28, 1974 and June 20, 1975. The extortion in indictment 76 CR 600 is alleged to have occurred from April, 1971 until December, 1975 and from June 1, 1972 until April 1, 1973.

Ivanhoe Metal, Inc. is the alleged victim in Count 29 of indictment 76 CR 598 and Counts 1 and 5 of indictment 76 CR 600. The extortion in indictment 76 CR 598 is alleged to have occurred in October, 1973. The extortion in indictment 76 CR 600 is alleged to have occurred in April, 1971 until December, 1975 and on April 25, 1974.

Northway Construction, Inc. is the alleged victim in Counts 32, 33 and 34 of indictment 76 CR 598 and Counts 1 and 7 of indictment 76 CR 600. The extortion in indictment 76 CR 598 is alleged to have occurred on September 15, 1971, December 4, 1973 and from January 17, 1975 until August 5, 1975. The alleged extortion in indictment 76 CR 600 is alleged to have occurred from April, 1971 to December, 1975, and from February, 1973 to February, 1974.

Professional Construction Company is the alleged victim in Count 35 of indictment 76 CR 598 and Counts 1 and 3 of indictment 76 CR 599. The extortion in indictment 76 CR 598 is alleged to have occurred from April 30, 1971 to May 16, 1972. The extortion in indictment 76 CR 599 is alleged to have occurred in June, 1971 and from April, 1973 to May, 1973.

Reuben E. Smith Construction Company is the alleged victim in Counts 37 and 38 of indictment 76 CR 598 and Counts 1 and 2 of indictment 76 CR 601. The extortion in indictment 76 CR 598 is alleged to have occurred in September, 1974 and from September, 1974 to October, 1974. The extortion in indictment 76 CR 601 is alleged to have occurred in March, 1974 and from October, 1974 to February, 1975.

Star Erection Service is the alleged victim in Count 39 of indictment 76 CR 598 and Counts 1 and 8 in indictment 76 CR 600. The extortion in indictment 76 CR 598 is alleged to have occurred on May 29, 1975. The extortion in indictment 76 CR 600 is alleged to have occurred from April, 1971 to December 1975, and from April, 1974 to December, 1975.

Steel Design and Construction Erections is the alleged victim in Count 40 of indictment 76 CR 598 and Counts 1 and 2 of indictment 76 CR 600. The extortion in indictment 76 CR 598 is alleged to have occurred in May, 1971. The extortion in indictment 76 CR 600 is alleged to have occurred from April, 1971 to December, 1975 and from April, 1971 to September, 1971.

Steel Structures, Inc. is the alleged victim in Counts 41, 42, 43 and 44 of indictment 76 CR 598 and Counts 1 and 5 of indictment 76 CR 599. The extortion in indictment 76 CR 598 is alleged to have occurred on January 4, 1974, January 19, 1974, May, 1974 and February, 1975. The alleged extortion in indictment 76 CR 599 is alleged to have occurred in June, 1971 and from June, 1971 to November, 1971.